

UNITED STATES OF AMERICA)
)
 v.)
)
 Manning, Bradley E.)
 PFC, U.S. Army,)
 HHC, U.S. Army Garrison,)
 Joint Base Myer-Henderson Hall)
 Fort Myer, Virginia 22211)

**Prosecution Notification
 to the Defense of
 Statements under RCM 914**

3 August 2012

1. On 26 July 2012, the Court ordered the prosecution to notify the defense what types of pre-trial statements the prosecution intends to disclose to the defense under Rule for Courts-Martial (RCM) 914. RCM 914 states as follows:

After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is: (1) [i]n the case of a witness called by the trial counsel, in the possession of the United States; or (2) [i]n the case of a witness called by the defense, in the possession of the accused or defense counsel.

RCM 914(a); see also RCM 914, analysis (the rule is based on the Jencks Act, 18 U.S.C. § 3500). The “rule is not intended to provide a general right of discovery, but ‘to prevent a party from gaining an unfair advantage in the trial arena by withholding evidence that could impeach that party’s witness.’” United States v. Parks, 2009 WL 6841857 (A.C.C.A. 2009) (citing United States v. Lewis, 38 M.J. 501, 508 (A.C.M.R. 1993)). RCM 914 applies at trial; nevertheless, “the rule is not intended to discourage voluntary disclosure before trial, even where RCM 701 does not require disclosure, so as to avoid delays at trial.” RCM 914, analysis.

2. RCM 914(f) defines what qualifies as a “statement.” See RCM 914(f). Statements include written or electronic records signed, initialed, or otherwise adopted by a witness, e-mails sent by a witness, transcriptions or recordings of an oral statement made contemporaneously with the making of that statement and consisting of a substantially verbatim recital of that statement, testimony given in an Article 32 investigation or grand jury proceeding, and other “statements which could properly be called the witness’ own words.” Parks, 2009 WL 6841857 (citing Palermo v. United States, 360 U.S. 343, 352 (1959)); see also United States v. Holmes, 25 M.J. 674 (A.F.C.M.R. 1987) (information a witness told an investigator, compiled outside the witness’ presence and after-the-fact, is not a “statement” under RCM 914); see also United States v. Staley, 36 M.J. 896, 898 (A.F.C.M.R. 1993) (recordings or transcripts of testimony before an administrative discharge board are subject to RCM 914).

3. RCM 914 applies only to materials in the possession of the prosecutorial arm of the United States. See United States v. Ali, 12 M.J. 1018, 1019 (A.C.M.R. 1982); see also United States v.

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Gomez, 15 M.J. 954, 964 (A.C.M.R. 1983); United States v. Calley, 1973 A.C.M.R. 14570 (statements given to Congress are not subject to Jencks); RCM 914, analysis. In Ali, the court held that statements submitted to a company commander engaged in the prosecutorial function were statements within the meaning of Jencks, but that statements submitted to the charge of quarters, albeit a representative of the commander but who was not engaged in the prosecutorial function, was not within the Jencks Act. See Ali, 12 M.J. at 1019; see also Calley, 1973 A.C.M.R. 14570 (the phrase “the United States” is used “in a functional, prosecutorial sense”).

4. The prosecution proposes the following process to search for, preserve, and disclose material under RCM 914:

a. For all witnesses, the prosecution will search its records, and will request that investigative agencies search their records, for any statements that the prosecution reasonably expects will relate to the subject matter of each witness’s anticipated testimony on direct examination. The prosecution will disclose such statements in accordance with the filing date set by the Court.

b. For any potential rebuttal witness, the prosecution will preserve any applicable statements and timely disclose those statements under RCM 914 should the witness testify.

5. The prosecution understands its continuing obligation to provide material under RCM 914.



J. HUNTER WHYTE
CPT, JA
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